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NEW YORK STATE SUPREME COURT

APPELLATE DIVISION - THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

A.D. NO. CR-23-1493

NAUMAN HUSSAIN,

Defendant-Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS..2

ARGUMENT 33

I. SUPREME COURT'S CHARGE TO THE JURY DEPRIVED APPELLANT OF A FAIR TRIAL…. .... …33

II. THE PEOPLE FAILED TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT …. .... …50

III. SUPREME COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT AN ADJOURNMENT TO ALLOW APPELLANT LONGER THAN 20 MINUTES TO ACCEPT AN ENHANCED SENTENCE AND RESULTED IN AN UNINTELLIGENT, UNKNOWING AND INVOLUNTARY MOTION TO WITHDRAW…. .... …63

IV. APPELLANT'S SENTENCE SHOULD BE REDUCED IN THE INTEREST OF JUSTICE AS THE SENTENCE IMPOSED WAS UNDULY HARSH AND EXCESSIVE............ …76

CONCLUSION 84

TABLE OF AUTHORITIES

CASES Page(s)

Chambers v Mississippi,
410 US 284 [1973] 41

Com v Keysock,
345 A2d 767 [Pa Sup Ct 1975] 55

Derdiarian v Felix Contr Corp,
51 NY2d 308 [1980].. 46

Finnigan v Lasher,
90 AD3d 4612860 [2009].. 46

Glasser v United States,
315 US 60 [1942] 65

Jackson v Virginia,
443 US 307 [1979] 50

Matter of Anthony M.,
63 NY2d 270 [1984].. 45

Matter of Hussain v Lynch,
215 AD3d 121 [3d Dept 2023].. 66, 73, 75

Padilla v Kentucky,
559 US 356 [2010] 69

People v Andujas,
79 NY2d 113 [1992].. 39

People v Asan,
22 NY2d 526 [1968].. 45

People v Ballenger,
106 AD3d 1375 [3d Dept 2013].. 52

People v Baskerville,
60 NY2d 374 [1983] 34

People v Bell,
38 NY2d 116 [1975] 34

People v Bleakley,
69 NY2d 490 [1987] 61

People v Bonaventura,
271 AD 900 [2d Dept 1946] 54, 55

People v Booker,
141 AD3d 834 [3d Dept 2016] 64

People v Bostic,
34 AD2d 597 [3d Dept 1970] 71

People v Butler,
273 AD2d 613 [3d Dept 2000] 51

People v Butts,
72 NY2d 746 [1988] 45

People v Congregation Khal Chaisidei Skwere,
232 AD2d 919 [3d Dept 1996] 55, 58, 59

People v Contes,
60 NY2d 620 [1983] 50

People v Cooper,
307 NY 253 [1954] 64

People v Crum,
272 NY 348 [1936] 62

People v Danielson,
9 NY3d 342 [2007] 51, 61

People v Davis,
28 NY3d 294 [2016].. 33, 35, 52

People v Drake,
7 NY3d 28 [2006].. 34

People v Duffy,
79 NY2d 611 [1992].. 48

People v Farrar,
52 NY2d 302 [1981]... 76, 77

People v Fiumefreddo,
82 NY2d 536 [1993].. 74

People v Foy,
32 NY2d 473 [1973].. 73

People v Gamble,
18 NY3d 386 [2012].. 65

People v Gaworecki,
37 NY3d 225 [2021].. 60

People v Gravino,
14 NY3d 546 [2010].. 70

People v Haffiz,
19 NY3d 883 [2012].. 73

People v Harris,
61 NY2d 9 [1983].. 74

People v Harris,
162 AD3d 1240 [3d Dept 2018]... 62

People v Hawkins,
11 NY3d 484 [2008].. 50

People v Hill,
9 NY3d 189 [2007] 65

People v Hooks,
96 AD2d 1001 [3d Dept 1983] 77

People v J.L.,
36 NY3d 112 [2020] 34

People v Kane,
213 NY 260 [1915] 44

People v Kern,
75 NY2d 638 [1990] 45

People v Kibbe,
35 NY2d 407 [1974] 35, 44, 48

People v Koch,
299 NY 378 [1949] 65

People v Li,
34 NY3d 357 [2019] 45

People v Licitra,
47 NY2d 554 [1979] 52, 59

People v Manini,
79 NY2d 561 [1992] 50

People v McLaughlin,
291 NY 480 [1944] 65

People v Morton,
288 AD2d 557 [3d Dept 2001] 79

People v Nixon,
21 NY2d 338 [1967] 66

People v Norris,
190 AD2d 871 [2d Dept 1993].. 68

People v Owens,
69 NY2d 585 [1987].. 39

People v Phippen,
232 AD2d 790 [3d Dept 1996].. 37

People v Rahaman,
189 AD3d 1709 [3d Dept 2020].. 76

People v Reagan,
256 AD2d 487 [2d Dept 1999].. 53

People v Riback,
57 AD3d 1209 [3d Dept 2008].. 79, 80

People v Rolston,
66 AD2d 617 [2d Dept 1979].. 65

People v Roth,
80 NY2d 239 [1992].. 36, 38, 53, 54

People v Schultz,
73 NY2d 757 [1988].. 71

People v Shaw,
124 AD2d 686 [2d Dept 1986].. 79

People v Singleton,
41 NY2d 402 [1977].. 64

People v Spears,
64 NY2d 698 [1984].. 64, 68, 69

People v Stewart,
40 NY2d 692 [1976].. 33, 35, 44, 47, 52

People v Suitte,
90 AD2d 80 [2d Dept 1982] 77

People v Torres,
165 AD3d 1325 [3d Dept 2018] 66, 67

People v Umali,
10 NY3d 417 [2008] 34, 35

People v Van Pelt,
76 NY2d 156 [1990] 79

People v Warner-Lambert Co,
51 NY2d 295 [1980] 36, 37, 56

People v White,
104 AD3d 1056 [3d Dept 2013] 66, 67

Tapia v United States,
564 US 319 [2011] 83

PRELIMINARY STATEMENT

By right, appellant, Nauman Hussain, appeals from a judgment of the Supreme Court, Schoharie County (Lynch, J.), rendered on May 31, 2023, convicting him, after a jury verdict, of twenty counts of manslaughter in the second degree and sentencing him to an indeterminate term of five to fifteen years in prison. A stay had been sought and denied on August 25, 2023 (Egan, J.) and appellant is incarcerated pursuant to the judgment herein.

STATEMENT OF FACTS

The Charges

According to the indictment, appellant recklessly caused the death of 20 people and with criminal negligence caused the death of 20 people (A 2-12).

The People's Case

Limousine Operation

Shahed Hussain, appellant's father, operated a limousine rental business run under various names, including Hazy Limousine, Saratoga Luxury Limousines and Prestige Limousine and Chauffer Service. Appellant assisted his father with the business and, at the time of the crash, handled the day-to-day affairs of the business.

In 2015, Marcia Albano, set up a lead generation website for limousines and once the website gained traction, she marketed the generated leads to limousine companies (A 67-68). She contacted Hazy Limousine and met with appellant who introduced himself as "Shawn" and represented himself as the owner of the company (A 69-70). Eventually, appellant asked her to create a second website to expand into the Albany market, which she did (A 71).

In 2016, Shahed contacted an insurance broker and that resulted in an insurance policy in the name of Shahed Hussain doing business as Prestige

Limousine & Chauffeur (A 77-78). The broker never met Shahed (A 81). Any changes made to the coverage after the initial policy was handled by "Arslan" (A 77).

On July 22, 2016, Prestige Limousine added coverage to the 2001 Ford Excursion limousine (A 79). The company issued a for hire insurance card with 16 passengers based on the vehicle's title (A 80). According to the broker, the DMV registration will match the seating capacity on the vehicle, unless the person misrepresented the number during the transaction (A 82). Scott Lisinicchia was never listed as one of the drivers of the limousines (A 79).

Passenger Transportation Regulations

Multiple employees from the New York State Department of Transportation ("NYSDOT") and other agencies, testified about regulations in place for vehicles that transport passengers.

If an individual operates a vehicle for passenger transportation and the vehicle has a seating capacity over 10 adults, then that individual must have NYSDOT authority (A 83). The process for obtaining a certificate of authority includes submission of an application, publicizing the application, submitting compliance such as insurance and finally, an inspection of the vehicle (A 102). A commercial motor vehicle includes (1) any vehicle that

has a seating capacity over 8 adults, including the driver, if used for direct compensation and (2) any vehicle that has a seating capacity over 15 adults, including the driver, in furtherance of a business (A 86). In addition, to operate a commercial motor vehicle that has 16 or more passengers, the operator needs a passenger endorsement (A 221).

A commercial driver's license requires drug and alcohol testing if the vehicle is being used in furtherance of a business (A 86). A 16 passenger commercial motor vehicle for hire requires a NYSDOT inspection, which occurs following operating authority from NYSDOT or from the Federal Motor Carrier Safety Administration (A 236). A NYSDOT inspection differs from a NYSDMV inspection (A 84-85). For example, that inspection is completed by an employee of New York State, not a third party (A 236).

Transportation Law Section 152 provides that a certificate or permit is required for the common or contract transportation of passengers (A 92). The entity or carrier must have a preventive maintenance program in place to ensure regular maintenance intervals (A 93-94). Any repairs needed must be completed in the manufacturer recommended manner or in a manner that satisfies applicable industry standards (A 94). For example, the maintenance must be done in an adequate and safe facility, which includes a pit or a lift (A 94-95).

A carrier must submit a written notification of what the preventive maintenance program entails to NYSDOT (A 95-96). Regulations require that a pre-trip inspection be completed and that post-trip review reports be completed (A 96). The reports generated must be in writing and saved for six months (A 96-97). A DOT inspector must inspect the vehicle twice a year and to review the maintenance interval records (A 98).

2001 Ford Excursion Limousine

Advantage Transportation bought the 2001 Ford Excursion Limousine in 2007 from Royal Limousine Service (A 244-45). Eventually, Advantage Transportation sold the limousine to Shahed (A 246-47). Shahed and two sons, including appellant, came to the facility and went over the rules and regulations applicable to the limousine (A 247-48).

NYSDOT Investigation/Inspection

On July 8, 2017, Chad Smith passed by Mavis Discount Tire in Saratoga and observed the limousine (A 244-45). Despite the size of the vehicle, he did not see the appropriate markings on the side of the vehicle (A 89). When Smith ran the license plate, the registration specified a seating capacity of 11, which differed from his observation (A 89). He then checked NYSDOT's bus inspection database and found that the limousine had

previously been inspected several years before, but at an 18 seat capacity (A 90).

The next day, after finding a website that he believed operated the vehicle, Smith e-mailed the company (A 90-91). The email identified the vehicle and stated the following:

> This vehicle, if used to transport passengers for compensation, would require New York State DOT authority. Your operations do not currently have New York State DOT authority and your company will be subject to enforcement action if found to be transporting passengers for compensation in this vehicle. There is also a disconnect from the seating capacity listed for the vehicle and seating capacity previously listed for the vehicle. If this is correct, this would require the vehicle/driver to comply with having a USDOT number, CDLs, drug and alcohol testing, and the company would need to comply with the commercial motor vehicle requirements if using the vehicle in furtherance of any commercial enterprise. The transportation of passengers in a for-hire capacity within New York State in vehicles with a seating capacity of more than 10 passengers including the driver generally requires NYSDOT Certificate of Authority. If you operate NYSDOT-regulated vehicles, those vehicles will require a NYSDOT bus inspection. These will be required before your certificate to operate from NYSDOT is granted. If you operate NYSDOT-regulated vehicles, New York State DMV requires that you only utilize 19A certified drivers. This would generally require drivers to have a minimum of a CDL Class C with a passenger endorsement. If you are operating vehicles for compensation with a passenger capacity of 15 passengers or more, including the driver, you will have to fully comply with federal regulations (A 99-104).

Smith received no response to this email (A 105).

On or around June 26th or 27th, Smith checked the NYSDOT authority database to see if the carrier had applied for authority and, after finding no evidence of an application, he forwarded his concerns to the supervising motor carrier investigator (A 105).

On January 5, 2018, Smith followed up a complaint for a report of a limousine being operated in the Saratoga area and he encountered an unfamiliar Saratoga Luxury Limo website (A 105-06). The website appeared to offer passenger transportation for hire and he did not think the company had NYSDOT authority (A 106). When Smith accessed the company's Facebook website, he observed a photo of a stretch limousine that appeared to match the one he observed previously (A 106). He took the plate number from the photo and determined the vehicle was the same he had observed on June 8, 2017 (A 107-08).

Smith then e-mailed a request for transportation of 13 people to the company and he received an email response of a price (A 109-110). Later, Smith prepared a notice of violation, which alleged that an entity operated without valid NYSDOT authority in violation of Transportation Law Section 152 (A 112). On January 8, 2018, Smith called the phone number listed for the company on the website and asked for Shahed (A 111-12). The person identified himself as Shahed and Smith advised him of the notice of violation

(A 113-14). Smith confirmed the vehicle, the plate on the vehicle and an address to send the violation (A 114).

Along with the mailing of the violation, Smith sent the violation via email and scheduled a motor vehicle roadside inspection for the limousine (A 115). He also recommended that the company cease any transportation of passengers for compensation in any larger vehicles, specifically any vehicle that has a seating capacity over 10 people including the driver (A 116). When he followed up regarding the date of the inspection, Smith received a response that the limousine had been moved to Mavis for exhaust work (A 117-18). After receiving permission to inspect the limousine at Mavis, he scheduled the inspection (A 119).

On March 21, 2018, Smith met with appellant, who identified himself as Shahed, and proceeded to inspect the limousine (A 120, 132). He found several violations (A 121-22). The violations were as follows:

1. No State operating authority (A 122)
2. Incorrect vehicle registration and license plate as the vehicle had capacity for 18 people (A 123)
3. No USDOT number associated with the vehicle, which is required for a vehicle with a seating capacity of 15 adults including the driver in furtherance of a business (A 123)
4. The lack of a carrier name and USDOT registration number on both sides of the vehicle (A 123)
5. Operating a commercial motor vehicle without proof of a periodic inspection (A 122-23)
6. Carrier not certified through NYS DMV as a 19A bus driver unit (A 125)

7. ABS malfunction because the lamp remained on while the vehicle was running, which would not pass NYSDOT inspection (A 125-26)
8. Brake connections with constrictions under the vehicle; axle number 2 has a vice grip attached which constricts the hydraulic brake (A 126)
9. The defective emergency exits because two emergency exits were not working (A 127)
10. Missing Federal manufacturer's tag (A 128)
11. 25% of the brakes were defective, which was considered an out of service violation (A 129-30)
12. Operating a passenger carrying vehicle in excess of the manufacturer's designed seating capacity (A 130-31)
13. Brakes in general because the hydraulic brake line going to axle one was dangling and able to make contact with the tire, which was considered an out of service violation (A 131).

Smith gave appellant a copy of the report and also gave him a compliance packet (A 133-34). He later followed up with an email that identified the items in bold that needed to be corrected (A 138).

Smith advised appellant, after observing the inspection sticker on the limousine, that it was not the appropriate type of inspection; he told appellant a NYSDOT bus inspection was required (A 135). At the completion of the inspection, Smith affixed an out of service decal to the vehicle—a formal notification that advises that the vehicle is placed out of service and cannot be used until repaired (A 136). He explained this to appellant and also explained that the sticker can be removed by anyone who knows that repairs were made (A 136-37, 166).

On June 20, 2018, Smith conducted a follow up and did a "spot check" on the limousine (A 472). When he looked underneath the rear end of the

limousine to see if the vice grip was still attached, he saw shiny metal, giving him the impression that there had recently been mechanic work done on the brake (A 140). He saw no tire markings and believed that the limousine had been undergoing mechanical work and was not in use (A 140-41). The out-of-service decal was not affixed to the windshield (A 140-41).

On July 28, 2018, Smith set out to do another spot check of the limousine and discovered that the limousine was in the Mavis parking lot (A 141-42). He watched the limousine for around 15 to 30 minutes and when the vehicle had not moved, he believed mechanical work was ongoing and he left (A 142).

On August 25, 2018, David Roy, a state trooper assigned to the commercial motor vehicle enforcement unit patrolled the Saratoga track area looking for busses and limousines to inspect (A 211-13). He observed a white limousine stopped on East Avenue, unloading passengers (A 213). The limousine did not have the required markings of a commercial motor vehicle based on the seating capacity when the vehicle is for hire (A 214-15). He met with the driver, Lisinicchia, and obtained his driver's license and the vehicle registration (A 215-16, 218).

The registration, which was obtained on May 25, 2018, specified the limousine had seating capacity for 8 (A 217-18). On the registration, the

appropriate box was checked specifying the vehicle is used for hire with a driver, but the box indicating that the vehicle is subject to DOT inspection requirements was not checked (A 469-71). Lisinicchia had a commercial driver's license Class A, but he did not have a passenger endorsement (A 218-19). As a result of these observations, Roy directed Lisinicchia to drive to the lot to inspect the limousine (A 219).

As Roy began his inspection, appellant arrived and introduced himself (A 220-21). Roy explained to appellant the passenger endorsement requirement and the issue with the lack of markings on the limousine (A 223-24). After requesting for the contract in place for the drive that day, appellant e-mailed him a copy (A 225-26). He inspected the interior of the limousine and determined that it had a seating capacity of 19, including the driver (A 230-31).

Roy issued several violations, including one for a driver with no passenger endorsement and another for the failure to have a DOT number (A 227-28). He explained that Lisinicchia could not operate the limousine until he receives a passenger endorsement (A 227). The violation specified that Lisinicchia was out of service and directed that no motor carrier shall permit or require this driver to operate any vehicle until the driver has the proper passenger endorsement to operate that type of vehicle (A 229).

Martin Duffy, a supervising motor carrier investigator with the office of modal safety and security with NYSDOT provided on-site assistance to Roy (A 232-33). Duffy examined the limousine and noticed warping towards the bottommost portion near the pillar behind the driver's seating position (A 234). He also observed an inappropriate inspection sticker and registration document affixed to the windshield (A 235).

Duffy investigated further, learning that Lisinicchia had been disqualified from the NYS DMV Article 19A Driver Registration Program, which requires drivers to maintain good status to be a bus driver (A 237-38). He discovered that none of the trade names used by appellant had a 19A profile in the DMV system and none of the names of the companies had valid operating authority on file in NYSDOT (A 238-40). He drafted a notice of violation and mailed it to appellant (A 241-42). The violations included failing to register a USDOT number, operating a 19A disqualified driver, operating without a NYSDOT diamond inspection decal and operating without authority from NYSDOT (A 243).

Two days later, once Smith learned of the roadside inspection, he arranged another inspection of the limousine to determine its status (A 143-44). That inspection occurred on September 4, 2018 (A 144-45). Appellant was present for the inspection and following its conclusion, Smith wrote a

report of the violations and went over them with appellant (A 146-48, 154). Progress had been made; for example, appellant had obtained a USDOT number and the brake line was no longer defective (A 154). Issues, however, remained, including the following:

1. Carrier name and USDOT not displayed on either side of the vehicle (A 148)
2. No State operating authority (A 148)
3. Failure to correct defects noted on previous inspection report (A 148)
4. Incorrect vehicle registration and license plate as the vehicle had capacity for greater than 15 passengers, including the driver (A 149)
5. Operating a commercial motor vehicle without proof of a periodic inspection (A 150)
6. Inspection, repair and maintenance of parts and accessories due to deterioration of B post left side at frame rusted through (A 150)
7. ABS malfunction because the lamp remained on while the vehicle was running (A 150)
8. Windshield wipers defective due to windshield washer system reservoir being empty (A 151)
9. The defective emergency exits because two emergency exits were not working (A 151)
10. Vehicle missing final manufacturer FMVSS tag (A 151)
11. Operating a passenger carrying vehicle in excess of the manufacturer's designed seating capacity (A 152)
12. The ABS line going to axle number one was hanging and able to contact axle number one left side tire, which was an out-of-service violation (A 152-53)
13. Carrier not certified through NYS DMV as a 19A bus driver unit (A 153)

After the inspection, Smith affixed another out-of-service decal to the windshield and specified in email that the violations need to be corrected before the vehicle can be used on the roadways (A 155-57).

On September 6, 2018, Smith sent an email stating that the registration for the vehicles were scheduled for suspension because the notice of violation remained unaddressed (A 158-59). He also e-mailed a passenger carrier education packet, designed to assist people with compliance (A 160-61). The packet discusses operating authority, bus inspections, driver qualifications, driver drug testing and maintenance requirements (A 161).

On September 11, 2018, Smith sent an email stating that the USDOT needed to be updated to reflect the actual nature of the business, such as the correct business name and actual operations (A 162-63). Smith wrote that if the USDOT registration was not updated by September 19, 2018, then he would forward the matter to the Federal USDOT for action (A 163). He also sought drug and alcohol testing documents on any of the drivers (A 164-65).

Mavis Mechanical Work on Limousine

Appellant trusted the local Mavis store to perform mechanical work on the limousine and he did so regularly since 2016 (A 169). At Mavis, appellant dealt with Virgil Park, the store manager and certified mechanic (A 167-68). Park was later fired by Mavis following the investigation into the crash (A 187). Appellant provided Park with a business name of Prestige Limo and brought limousines in for service himself or through Lisinicchia (A 170-71).

In January 2018, appellant brought the limousine into Mavis for service of the brake system (A 171-72). Park, however, could not recall the service that was provided (A 172).

Between January and April 2018, appellant called Park for advice and stated that they had put transmission fluid in the master cylinder (A 172). Park advised appellant not to drive the vehicle, to try to remove the transmission fluid with a turkey baster and then take the vehicle somewhere to get it flushed (A 172).

On April 23, 2018, appellant took the limousine to Mavis requesting brake service because the right rear brakes were grinding (A 173). The brake pedal was very low (A 173). Notably, appellant requested brake service after receiving violations from Smith involving the limousine's brakes.

After removing the wheels, Park noticed that the pads were not there; they had worn down to metal (A 174). When they opened the bleeder, part of the hydraulic caliper on the tire of the vehicle, they observed a red substance (A 174-75). Since red is the color of transmission fluid, Park concluded that it had not been completely removed and had worked its way through the entire system (A 174-75).

Park recommended a hydraulic fluid flush and to replace all four calipers along with the brake hoses (A 176). According to Park, appellant told

him to do the bare minimum to get it fixed so that he could get it back on the road because it was prom season (A 176-77). Appellant instructed Park to get the limousine back up so it has brakes, brake pads and whatever was needed on the one side (A 177).

On May 11, 2018, the repairs were completed – the back rear caliper had been replaced, the pads had been replaced, the brake hose had been replaced and the system had been bled; appellant came to pick it up (A 178, 204). This work resulted in the brake pedal operating normally (A 205). Park had ordered a master cylinder for the limousine, billed appellant for it, but never used it, claiming it was an error; he even billed him for labor involving replacing the master cylinder (A 177-78). Park also billed appellant for a brake system flush, but did not actually perform the flush (A 188-90). A bleed simply removes trapped air from the system (A 190).

When appellant arrived to pick up the vehicle, he told Park he could not take unless it was inspected (A 178). Park, however, did not inspect the limousine. Instead, Park gave Thomas Klingman, another mechanic at Mavis, his inspector's card and told him to get it done after Klingman refused to do the inspection (A 179, 206). In fact, Mavis could not inspect commercial motor vehicles that weighed over 10,000 pounds (A 180). Even so, Park told

appellant they would do the inspection and billed him for the inspection (A 201-03).

Park gave Klingman his inspection card and password (A 206-07). Klingman scanned the VIN number, used Park's card and password, answered the prompts and Park gave him a sticker to put on the limousine (A 206-07). But Klingman never performed a safety inspection on the limousine (A 208). He did not remove any wheels from the limousine to inspect the brakes; he did not check the brake pedal reserve, fade or master cylinder; he did not check the disk brake pads, the drum brake linings, the brake drums or rotors; and he did not check the brake lines and hoses for leaks, cracks, chafing, restrictions or improper support (A 208-09). Klingman simply went through the system, passing everything without checking anything; he testified Park knew he did this and wanted Klingman to pass the limousine and put a sticker in the window (A 210).

Appellant signed the invoice and paid for the work, which included a brake system flush (not done), brake master cylinder (not done), inspection (not actually performed), and the replacement of the brake calipers, hoses and lines (A 192-93, 195-96).

On June 29, 2018, Park spoke with appellant about what needed to be done to fix the limousine correctly and Park claims he told him the limousine

needed to replace all four calipers, the hoses and the master cylinder (A 181-82). According to Park, he told appellant to burn the limousine (A 182).

On July 6, 2018, Park met appellant in the store and told him that the limousine's brakes were not holding pressure (A 183). According to Park, he told appellant that he removed as much transmission fluid as he could and that there could be repercussions, meaning internal components could fail (A 183-84). He testified that to fix the limousine properly would require the replacement of the brake lines, calipers, power booster, master cylinder, ABS module, any rubber components and to blow the steel lines out with compressed air (A 184-85). Appellant asked him to do the minimum to get it back on the road (A 186).

During the conversation with appellant, Park reminded him of what they had done, including the calipers, hoses and the master cylinder, despite the return of the cylinder (A 197-98). He even drove the limousine with appellant and told him the brakes were working (A 199-200).

October 6, 2018

On October 6, 2018, Axel Steenburg contacted appellant around 9:00 AM in search of a limousine rental for between 16 and 18 passengers (A 269). The limousine picked up the party in Amsterdam, New York at 1:00 PM to go to Ommegang Brewery (A 269-70).

That day, Lisinicchia drove the limousine (A 249). Carol Cornett, who worked for the Hussain family in connection with a motel, received instruction from appellant to give Lisinicchia $200 (A 72-75). Lisinicchia arrived at the motel that morning in the limousine and Cornett gave him the $200 (A 75-76).

As the limousine charted its course, several people observed it on the roadways. One such person, Matt Heller, followed the limousine for about 13 miles (A 250). He described the limousine as loud and stated that it emanated a very strong, burning brake smell (A 250). Heller turned off the heat in his car because every time the limousine's brakes were used, he could smell a burning brake metal smell; this occurred whenever the brake lights turned on (A 251-52). Another person, Mark Zemcik, observed the limousine driving and described the wheels as very dirty from brake dust (A 253-54).

October 6, 2018 – The Crash

Holly Wood and her daughter were traveling near the intersection of 30 and Route 7 when she saw a limousine that had pulled over to the right side of the road and had flashers on (A 255-56). The limousine was slowly rolling forward right before the beginning of a guardrail where two "no truck" going down the hill signs are located (A 256-57). After the limousine crossed the I-88 bridge, Wood drove around the limousine and stopped at the stop sign at

the bottom of the hill (A 257-58). As Wood waited at the stop sign, she heard an awful noise coming from behind her and the limousine headed right at her; the limousine swerved, missing Wood and hit a gully (A 259-60).

The descending limousine struck Jacklyn Schnurr's car, a Highlander, in the parking lot of the Apple Barrel as she stood there with family (A 261-62). Schnurr ended up on the ground (A 262). One individual was launched into the air and struck the trees near the parking lot (A 263).

October 6, 2018 – Police Response

Senior Investigator Erika Hock responded to the scene and observed a limousine that had crashed into a very large culvert at the bottom of the hill (A 264-65). She saw multiple deceased individuals, including body parts hanging outside the windows of the limousine (A 265). She also observed that another vehicle had been struck in the parking lot (A 265). The driver of the limousine was deceased and pinned in the driver compartment (A 266).

After running the limousine's registration, Hock did an internet search and called the business phone number listed (A 267-68). She spoke with appellant, informed him that a very serious accident had occurred and inquired into the identities of the driver and passengers (A 269). She then asked him if he could respond to Latham for another interview, which he agreed to do (A 271).

Appellant's Interview

Appellant went to Latham to meet with an investigator with the New York State Police (A 278). He spoke with the investigator and provided a written statement. The statement read as follows:

> On October 6, 2018 at 5:16 PM, full name, Nauman Hussain, state the following: I am the manager of Prestige Limousine & Chauffeur Service located in Gansevoort, New York. The company is owned by father Shahed Hussain. My father is currently overseas and unavailable so I am running the business.
>
> Today at about 8:56 AM, a person who identified himself as Axel Steenburg called my limo service looking to rent a limo for today. He told me he had rented another service but they were having problems so he was looking for a limo for today from my company. He told me the pickup point would be 19 Pleasant Street in Amsterdam, New York and that they would be going to the Ommegang Brewery in Cooperstown, New York. Also, he would tell the driver the name of other places they would be going. I gave him a quote, and he said he would check with his party and get back to me.
>
> A short time later he called back and agreed to the price. I called one of my drivers, Scott Lisinicchia asked him if he was available for the job, and he said yes. I then texted him all the info for the service, where to pick them up, customer name, and where they were going. He responded that he would go get the car. I did not have any other communication with Scott. It is common not to hear from a driver until the trip is completed.
>
> At about 5:55 PM today, I received a call from Investigator Erika Hock telling me that my vehicle was in a serious accident out in Schoharie somewhere near 30 and 30A maybe. I had to ask her a couple times because it didn't seem real (A 279-81).

Police Investigation

A tip led Hock to a Craigslist advertisement that listed the limousine for sale a few days before October 6th (A 272). The posting was for the limousine with a price of $9,000 (A 272-73). The number for interested

parties to contact was the personal cell phone number provided to Hock by appellant (A 274). The advertisement stated it was an 18 passenger, DOT-ready, full serviced limousine (A 274).

Appellant completed a voluntary consent to search form, allowing the police to search his vehicle (A 274-75). The search of the vehicle revealed a crumpled-up DOT out-of-service sticker (A 276-77).

Expert Testimony

Robert Mower, an investigator in the collision reconstruction unit, concluded that based on the evidence and damage profiles of the limousine and the Highlander, the front end of the limousine struck the rear of the Highlander (A 345-46). The limousine itself weighed 10,000 pounds (A 347). Mower found no brake fluid on the road down the hill or any evidence of braking on the road (A 347). He measured the length of the road to the crash site, which was about 9,619 feet with an elevation difference of 562 feet (A 348).

The People retained Brian Chase to conduct a vehicle autopsy of the limousine (A 287). Chase is the founder of Comprehensive Motor Vehicle Services and Consulting, which does vehicle forensics, collision reconstruction, analysis of vehicles involved in motor vehicle collisions as well as incidents involving homicide with a motor vehicle (A 282). He is the

chief vehicle forensics expert for the company and the vehicle forensics expert for the US Attorney and the FBI in Washington D.C. (A 282-83). Chase has over 35 years of experience, training and education in the science of collision reconstruction in his role as a New Hampshire State Police sergeant and supervisor of the collision reconstruction unit (A 283). He also has 35 years of experience, training and education in the science of automotive technology and he is certified by the National Institute of Automotive Service Excellence (A 283-284).

A vehicle autopsy is the comprehensive disassembly analysis and testing of a vehicle's components solely to determine crash causation (A 285). The purpose is to determine whether any of the components of the vehicle contributed to the cause of the crash (A 286).

Before any inspection, Chase researched the specific vehicle through the Ford Motor Company to determine when the vehicle was built, where the vehicle was built and to learn every component installed in the vehicle (A 288). He investigated whether any open recalls for safety aspects existed, reviewed technical service bulletins and reviewed Ford service manuals (A 288). He then visually inspected the limousine (A 288-89).

After the visual examination, a complete and comprehensive photographic documentation was completed (A 289). Next, a systematic

disassembly of the components of the limousine ensued, resulting in about thirty boxes of physical evidence for Chase to perform a forensic analysis (A 289). The components were photographed before disassembly, during disassembly and as they were secured as evidence (A 290). Once secured, Chase then performed disassembly testing and analysis of all the components (A 290).

The extent of the frontal damage to the limousine was striking (A 291). Chase identified what he calls "crush," meaning how far the body components and structural components pushed rearward, including the engine and drive train (A 291-92).

Every vehicle traveling along the roadway has a certain amount of kinetic energy based on the speed and the weight of the vehicle; energy can be neither created nor destroyed, but energy is converted (A 292). When a vehicle impacts something, it creates crush energy, which is converted to damage (A 292). Using a 10,000 pound conservative weight estimate, Chase testified that a vehicle traveling 60 mph has 1.2 million foot pounds of kinetic energy, which increases to 2.1 million foot pounds of kinetic energy at 80 mph and increases to 3.3 million foot pounds of kinetic energy at 100 mph (A 292-93).

When a driver applies the brakes of a vehicle, the disk brake pads squeeze the disk brake rotor that spins as the vehicle travels down a roadway, slowing the vehicle; this leads to a byproduct of brake dust (A 294). Chase found black areas around the alloy of the right front tire, which is consistent with brake dust (A 294). The brake dust is consistent with braking efforts at the right front wheel location (A 294). The rear tires and wheel assembly did not have the brake dust accumulation on the outside of the wheel from braking forces (A 295-96).

In comparing the two front tires, Chase observed that the right front tire was a different size than the left front tire (A 297). One of the tires was shorter in diameter on one side of the front, meaning that the circumference of the tire is also less on one side than the tire on the other side (A 297-98). Chase explained that the difference in sizes should be noticeable to the driver, especially when braking, because the tire with the smaller radius spins faster at the same speed than the tire which is larger and in applying the brake, it requires more brake force, which pulls the vehicle to that side (A 298).

The limousine had a hydraulic braking system (A 303). Hydraulic brakes function as follows: when the driver depresses a pedal, fluid is forced from the pistons in the master cylinder through the front brake lines to the front disk brake calipers and to the rear disk brake calipers; the calipers

contain pistons and when the force of the pressure of the brake fluid reaches those pistons, the pistons exert outward and squeeze the rotor to provide braking action (A 303-04). The brake system converts the level of kinetic energy to stop the vehicle and it does that by thermal energy from friction (A 306). Simply stated, when the driver steps on the brake pedal, the master cylinder sends a certain amount of pressure to the different brake calipers, the caliper pistons extend and the disk brake pads squeeze the spinning rotor to stop it, resulting in friction and heat (A 306-07).

The principle of hydraulics means that fluids cannot be compressed (A 306). Brake fluid is specifically designed to not meet the boiling point, otherwise air is present, which allows the fluid to be compressed (A 306). Brake fluid also works to lubricate different seals and acts as a special lubricant for the rubber seals of the master cylinder and the brake calipers (A 306). A brake fluid flush occurs when a facility flushes the entire brake fluid out of all the lines and calipers and replenishes the brake fluid (A 334). This is needed because over time the boiling point for brake fluid lowers and the moisture within the brake fluid will deteriorate the rubber seals of the disk brake calipers of the master cylinder (A 334).

Chase examined the right rear brake system and he observed an amount of rust, an amount of oxidation and the almost delamination from rust on the

swept area of the rotor (where the disk brake pads contact) (A 299-300). The condition of this swept area reduces the amount of effective brake force due to the pitting, the rust and the corrosion (A 301). The rust can also embed itself in the disk brake pads reducing the effectiveness of the braking even more (A 301).

Here, Chase concluded that there was a failure of a section of brake tubing, resulting in no brake fluid under pressure being sent to the disk brake calipers, rendering the brakes at the left and right rear wheel locations inoperable (A 307). As a result, the brake fluid does not stay within the tubing, it exits (A 307-08). When a rear brake system failure occurs, the limousine will attempt to compensate by sending pressure to the left and right front brake calipers (A 308-09). A crimp in the brake line resulted in a restriction of brake fluid going to the right rear disk brake caliper and from returning (A 310-11).

Analysis of the right rear brake caliper revealed that both of the caliper pistons seized within the piston bore and did not operate as designed (A 312-13). Once the caliper was removed, Chase saw rust and corrosion in the swept area of the rotor, which occurred because the brake caliper was not functioning (A 314-16). He estimated that the pistons seized in the right caliper at least six months before the crash (A 339).

The left rear caliper revealed that only one of the two pistons extended when pressure was applied through the cavity (A 317). Though there would still be brake force, the extent of the brake force would be reduced (A 317). The swept area of the rotor on the left rear wheel brake similarly had rust, pitting and delamination, which reduces the efficiency of the brake (A 317). The brake pads had been replaced on the left rear, but he observed embedded rust from the condition of the rotor (A 318-19). He also noted scoring in the swept area, which is typically caused when a vehicle had previously been operated with a disk brake pad of which the friction material had worn down until it was steel to steel with no friction material in between (A 320). Chase described this condition as thermal distress (A 321).

In examining the front braking system, Chase noticed the odor of burned materials at both the right and left locations; the odor was strong and pungent of burned components (A 321).

The wiring harness connecting the antibrake system sensor located at the right front location was severed; this condition was preexisting because the copper strands of the wiring components had obvious corrosion on them (A 329-30). With a severed line, the computer control system shuts off the antibrake system assist so that there is no longer an antilock brake system function (A 330). When this occurs, a warning light appears on the dashboard

to advise the operator that the anitbrake system has a fault and is no longer operational (A 330).

Conclusion

Chase concluded that there was a failure, specifically a bursting of the transverse rear section of brake tubing, leaving the left and right rear brakes inoperable; though the limousine still had braking at the left and right front wheel locations, the tremendous amount of kinetic energy from the weight and the speed of the limousine attempted to convert only through the left and right front disk brake components, which became overwhelmed (A 322-23). Generally, under harsh braking, a disk brake system might reach a temperature of 400 degrees; here, however, Chase stated that the temperatures reached 1500 degrees and higher, leading to the burning of the brake dust and an intense odor (A 323-24). The temperatures were so high, the friction material of the brake pads became molten and filled the groove between the friction blocks (A 327-28).

The intense heat ultimately caused the brake fluid to boil, which introduced air into the liquid and the fluid can then be compressed (A 324). When the brake fluid boiled, the operator experienced a soft pedal, which ended up extending all the way to the floor with little braking properties due to the boiling brake fluid (A 325). When the fluid compressed, the brake pedal

extends further and further until it ultimately goes to the floor as far as it can go (A 325-26). This resulted in a diminished brake energy at the disk brake caliper locations, which led to no brake force at all at the left front and right front locations (A 326).

The driver had depressed the brake pedal to the limousine at the moment of impact because the push rod extended into the vacuum booster and into the master cylinder, which was operational before impact (A 331-35). A review of the brake pedal pad revealed a semicircular indentation, which is consistent with the driver's foot being on the pad at the time of impact (A 336-37).

The steel brake tubing failed (A 303). This occurred because of the extent of rust on the steel brake tubing; when the driver applied the brakes, the walls of the steel brake tubing were compromised and a fracture resulted (A 303). Chase estimated that the steel brake line should have been replaced at least two years before the crash (A 311). He believed it was the original line (A 343).

As the limousine descended the gradient, the right rear disk brake caliper was inoperable because both caliper pistons seized, leaving no braking at the right rear; the left rear location had deep striations, scoring, which resulted in a reduced level of braking; the transverse brake tubing was in a

condition of such extreme corrosion that the brake tubing burst resulting in no braking at either rear wheel location; the front braking system components brake energy were reduced due to preexisting corrosion and while there was some brake action, the intense heat from the boiling of the brake fluid led to a catastrophic loss of braking as it descended the gradient (A 338). Chase concluded that the cause of the crash was catastrophic brake failure attributable to a lack of proper maintenance (A 340).

In summary, as the limousine descended the long, steep gradient before impact, the driver would have applied the brakes to slow the increasing momentum of the vehicle due to the gradient; at some point, the driver would have increased the amount of brake pedal pressure required to slow the vehicle due to the inoperable right rear disk brake caliper and lack of braking at the wheel; the pressure of the brake fluid in the system resulted in a bursting failure of the transverse rear steel brake tubing; once that occurred, there was no brake action in the rear of the vehicle and the vehicle would have continued to pick up momentum as it descended the gradient; the operator would have continued to brake with only the front brake components operational; the operator would have first realized the brake failure because the vehicle did not seem to slow as it should; due to the extreme heat which glazed the disk brake pads, the brake fluid would have boiled, air would have been introduced and

now the fluid can be compressed; the driver would have realized the brake pedal could be pressed all the way to the floor with no braking action of the vehicle whatsoever and the speed increasing by momentum, ultimately crashing (A 341-42).

Charge, Verdict and Sentencing

The court submitted twenty counts to the jury: second-degree manslaughter and, as lesser included offenses, criminally negligent homicide. The jury reached a verdict, convicting appellant of twenty counts of second-degree manslaughter.

Appellant was sentenced to an indeterminate term of 5 to 15 years in prison for each count with each sentence running concurrently (A 462-67). He appeals.

POINT I

SUPREME COURT'S CHARGE TO THE JURY DEPRIVED APPELLANT OF A FAIR TRIAL

To convict appellant of second-degree manslaughter, the People had to prove that "he recklessly cause[d] the death of another person" (*see* Penal Law § 125.15[1]). As for causation, the People had to prove that appellant was a "sufficiently direct cause" of the other's death (*see People v Stewart*, 40 NY2d 692, 697 [1976]). To satisfy that standard, the People had to prove both: (1) that appellant's conduct constituted an "actual contributory cause" of death and (2) that death was a "reasonably foreseeable" result of the actor's conduct (*see People v Davis*, 28 NY3d 294, 300 [2016]).

Appellant made specific charge requests to ensure that the jury was properly instructed on the law on causation's two-pronged standard. First, appellant requested Supreme Court to instruct the jury that the People needed to prove that it was foreseeable to appellant that the crash would occur in the manner that it did—catastrophic brake failure—to satisfy the foreseeability requirement. That request was denied because the court refused to "micromanage the facts of the case in the legal instruction to the jury" (A 349-50). Second, appellant requested Supreme Court to instruct the jury regarding an intervening act. That request was denied without any explanation. Both rulings require reversal.

A. Supreme Court's Failure to Properly Charge the Jury on Forseeability Requires Reversal

<u>Jury Charge, Generally</u>

Trial courts must instruct juries on "the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts" (*see* CPL § 300.10[2]). The charge "must be tailored to the facts of the particular case" (*see People v Baskerville*, 60 NY2d 374, 382 [1983]). "A jury charge that ignores the factual contentions of either the prosecution or defense 'cannot be countenanced'" (*see People v J.L.*, 36 NY3d 112, 108 [2020] *citing People v Bell*, 38 NY2d 116, 120 [1975]).

Courts must "review the context and content of the entire charge" in evaluating a challenge to a jury charge (*see People v Umali*, 10 NY3d 417, 426-27 [2008]). A charge "may be sufficient, indeed substantially correct, even though it contains phrases which, isolated from their context, seem erroneous" (*see People v Drake*, 7 NY3d 28, 33 [2006][internal citations and quotations omitted]). As such, "a reviewing court must read the instruction as a whole to determine if it was likely to confuse the jury as to the proper burden of proof or if it is reasonable to conclude that the jury, hearing the whole charge, would gather from its language the correct rules which should

be applied in arriving at a decision" (*see Umali*, 10 NY3d at 427 [internal brackets, citations and quotations omitted]).

Jury Charge, Causation

Causation in criminal cases is different from causation in civil cases because "[a] distance separates the negligence which renders one criminally liable from that which establishes civil liability" (*see People v Kibbe*, 35 NY2d 407, 412 [1974]). A defendant's conduct must be both "an actual cause of death, in the sense that it forged a link in the chain of causes which actually brought about the death," (*see Stewart*, 40 NY2d at 697) and "a cause of death sufficiently direct as to meet the requirements of the criminal, and not the tort, law" (*see Kibbe*, 35 NY2d at 412). A cause of death is sufficiently direct in the criminal context when the defendant's conduct constituted an "actual contributory cause" of death and when the death was a "reasonably foreseeable" result of the defendant's conduct (*see Davis*, 28 NY3d at 300).

The pattern Criminal Jury Instruction on foreseeability provides as follows:

> Second, when is death a reasonably foreseeable result of the conduct? Death is a reasonably foreseeable result of a person's conduct when the death should have been foreseen as being reasonably related to the actor's conduct. It is not required that the death was the inevitable result or even the most likely result. And, it is not required that the actor have intended to cause the death (*see* CJI2d[NY] Penal Law art 125, Cause of Death).

The drafters of this instruction, however, caution courts that "[i]n certain instances, particularly deaths arising out of failures in the workplace, the 'forseeability' instruction may need to be expanded to meet the facts of the case" (*see* CJI2d[NY] Penal Law art 125, Cause of Death n3). In so doing, the drafters cite *People v Roth*, which explained "it was not enough to show that, given the variety of dangerous conditions existing at [a workplace] site, an explosion was foreseeable; instead the People were required to show that it was foreseeable that the explosion would occur in the manner that it did" (*see id. quoting People v Roth*, 80 NY2d 239, 243-44 [1992]).

The cautionary footnote exists because in the criminal arena, a general foreseeable risk and an action that ignites a chain of causation, resulting in death, cannot by themselves prove that a defendant caused a specific reckless homicide (*see People v Warner-Lambert Co*., 51 NY2d 295, 305-06 [1980]). Instead, the "actual immediate, triggering cause" of the victim's death must be foreseeable for a defendant to be found guilty of manslaughter in the second degree (*see Warner-Lambert*, 51 NY2d at 307).

For example, this Court, in *People v Phippen*, addressed the issue of causation in a second-degree manslaughter case where a truck owned by the defendant's company was involved in an accident, killing three passengers in another vehicle, after one of the front tires of the truck blew out (*see People v*

Phippen, 232 AD2d 790, 790 [3d Dept 1996]). In explaining causation, this Court held that "it must be proven that the actual cause of the blowout was a foreseeable result of the defendant's recklessness" (*see Phippen*, 232 AD2d at 791).

Similarly, the Court of Appeals explained that, in determining whether a defendant's acts were a sufficiently direct cause of death, the focus must be on "the nature of the chain of particularized events which in fact led to the victim's death" (*see Warner-Lambert*, 51 NY2d at 306). Discussing *Kibbe*, the court explained that it "was not enough that death had occurred as the result of the defendant's abandonment of their helpless victim" (*see Warner-Lambert*, 51 NY2d at 306). As the court observed, it was foreseeable if the victim died from freezing to death or from being killed when struck by a passing car, but it was not foreseeable if the victim had been killed instead "by an airplane making an emergency landing on the highway or when hit by a stray bullet from a hunter's rifle" (*see Warner-Lambert*, 51 NY2d at 307).

Warner-Lambert, *Phippen* and other cases demonstrate the need for a foreseeability charge tailored to the facts of the particular case. A general foreseeability charge, one that does not focus on the actual immediate, triggering cause of the victim's death, invites the jury to find guilt where the evidence is insufficient and to misuse a defendant's actions or inaction to

justify a finding of foreseeability. In that situation, it is impossible to have confidence in a jury's verdict.

Defense Charge Request

During the charge conference, appellant requested that Supreme Court instruct the jury that to find him guilty of second-degree manslaughter, it is not enough to show that a crash was foreseeable; instead, the People are required to show that it was foreseeable to the defendant that the crash would occur in the manner that it did, in other words because of a brake failure (A 473-74). Supreme Court, however, denied this request, stating that it was "not going to micromanage the facts of the case in the legal instruction to the jury" (A 349-50).

Supreme Court's Charge

"For purposes of criminal liability, it [is] not enough to show that, given [a] variety of dangerous conditions . . ., an [accident] was foreseeable; instead the People were required to show that it was foreseeable that the [accident] would occur in the manner that it did" (*see Roth*, 80 NY2d at 243-44). It was incumbent upon Supreme Court to instruct the jury in accordance with this well-settled principle. Even so, Supreme Court failed to convey this crucial concept, instead merely instructing the jury as follows with respect to foreseeability:

> A person causes the death of another person when that person's conduct is a sufficiently direct cause of the death of another. A person's conduct is a sufficiently direct cause of death when, one, the conduct is an actual contributory cause of the death, and two, the death was a reasonably foreseeable result of the conduct.
>
> When is death a reasonably foreseeable result of the conduct? Death is a reasonably foreseeable result of a person's conduct when the death should have been foreseen as being reasonably related to the actor's conduct. It is not required that the death was the inevitable result or even the most likely result. And it is not required that the actor had intended the cause of death (A 376-77).

Analysis

It bears repeating that courts have a duty to, in its charge to the jury, "state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts" (*see* CPL § 300.10[2]; *People v Andujas*, 79 NY2d 113, 118 [1992][adequacy of charge judged "against the background of the evidence produced at the trial"]). The Court of Appeals has explained:

> The court's charge is of supreme importance to the accused. It should be the safeguard of fairness and impartiality and the guarantee of judicial indifference to individuals. Because of the singular importance of jury instructions in criminal trials, a charge error may well result in the deprivation of a fair trial and consequent reversal of the conviction (*see People v Owens*, 69 NY2d 585, 589 [1987][internal citations omitted]).

Here, Supreme Court's charge was not the safeguard of fairness, depriving appellant of the fair trial he was constitutionally due. Instead, the

charge merely tracked the standardized charge on this issue. Supreme Court did not heed the drafter's caution of the need to expand the charge to meet the facts of the case nor was appellant's specific request in that regard given any credence.

The danger of a charge that is not tailored to the specific facts of a case is that a juror might interpret it to authorize a guilty verdict even if the People did not establish the defendant's guilt beyond a reasonable doubt. The lack of a specific charge also threatens juror unanimity, raising a concern that the jury could find the defendant guilty without unanimous agreement on the way the defendant committed the crime.

That danger is particularly acute where, as here, the People broadly assign criminal liability based on many acts and omissions in their bill of particulars and proceed to elicit testimony of such acts, which had nothing to do with the actual cause of the crash – catastrophic brake failure. For example, the People particularized, in part, that appellant was reckless in that the

> "2001 Ford Excursion Stretch Limousine was in poor condition;" "[t]hird parties had told the defendant the repairs he made were temporary and/or inadequate and the limousine required further repairs;" "individuals over a period of time, refused to drive the 2001 Ford Excursion Stretch Limousine because of its condition;" the "defendant repeatedly failed to properly maintain the vehicle;" the "defendant received multiple notices of violations from the NYS Department of Transportation and NYS Police and continued to cause passengers to be transported;" the "defendant attempted to sell the limousine before the crash;" the

> "defendant was told by third parties that he had to comply with DOT regulations to maintain the vehicle in sufficient repair to operate as a commercial motor vehicle;" "Defendant was reckless when he hired a driver who did not have authority to drive a 16 passenger vehicle/limousine and who lacked a P endorsement;" "Lisinicchia had not been drug tested and/or who had been placed out of service by the New York State Police and/or New York State Department of Transportation;" and "Defendant was told Scott T. Lisinicchia could not drive the 2001 limousine until Scott T. Lisinicchia obtained a P endorsement" (A 14-15).

The People elicited testimony and admitted exhibits to prove these particulars.

An example shows the need for the specific charge requested by appellant and demonstrates the lack of confidence in the jury's verdict. Lisinicchia had a commercial driver's license, but he did not have a passenger endorsement and police told appellant about the passenger endorsement requirement (A 218-19, 223-24). Police informed appellant that Lisinicchia could not operate the limousine until he receives a passenger endorsement and issued a violation specifying that Lisinicchia was out of service until he had the proper endorsement (A 227, 229). Lisinicchia had been disqualified from the NYS DMV Article 19A driver registration program and a violation was issued for operating a 19A disqualified driver (A 243).

Along the limousine's route, a witness observed a very strong, burning brake smell (A 250-52). Another witness testified that the limousine bypassed two "no truck" going down the hill signs (A 256-57). The People's expert

explained that the driver should have noticed that more brake force was needed based on the size of the tires because braking would pull the limousine to one side (A 298).

Based on Supreme Court's general charge and the People's presentation of evidence, the jury could have concluded that the driver of the limousine should have known something was wrong with the brakes well before crossing the bridge based on the burning smell, noise and performance and that the driver of the limousine, given the size, weight and number of passengers, should have known that driving down a road that trucks were prohibited to travel was unwise. Had appellant used a driver who had a passenger endorsement and who had not been disqualified under 19A, that driver would not have descended that hill with the limousine. To employ an unqualified driver was therefore reckless.

The People even argued this point to the jury during summation. In summation, the People repeatedly reminded the jury of the driver requirements. The prosecutor stated "If you operate NYSDOT-regulated vehicles, NYS DMV requires that you only utilize 19A certified drivers;" that appellant received a violation for "carrier not certified with the 19A plus driver unit;" and that "Roy explains to Scott Lisinicchia and [appellant] that Scott Lisinicchia does not have a P endorsement on his license, that he cannot

drive this vehicle (A 351-53). The prosecutor also told the jury that "Trooper Roy took Scott Lisinicchia out of service. He made it very clear. You don't have the endorsement, you cannot drive this vehicle" (A 353).

The prosecutor transitioned to the Scott Sherman wedding where Lisnicchia drove the limousine on September 1, 2018 (A 354). After reminding the jurors of this event, the prosecutor then told the jury:

> Scott Lisinicchia was an out-of-service driver. He had been taken out of service five or six days before. In evidence is Scott Lisinicchia's CDL and driving abstract. Scott Lisinicchia never got the P endorsement. Scott Lisnicchia was driving the vehicle five days after he was told not to drive it. Scott Lisinicchia was driving the vehicle five days after [appellant] was told not to allow this man to drive the vehicle. He doesn't have the proper endorsement. He cannot drive the vehicle. Yet, Scott Lisinicchia was the driver for the Scott Sherman wedding (A 354).

The prosecutor argued to the jury that appellant "created a substantial and unjustifiable risk that another's death would occur . . ."

> And he further created that risk when he had an out-of-service driver drive the vehicle on October 6, 2018, a driver who never got his P endorsement, if you refer to the evidence of his driver's abstract and his CDL license. He had created the substantial and unjustifiable risk by willfully, intentionally, and knowingly refusing to comply with the applicable regulations. [Appellant] willfully, intentionally, and knowingly chose to disregard that risk. That was a conscious choice of his, to disregard the risk that he had created, when he agreed to transport 17 people for hire in the Ford Excursion stretch limousine on October 6, 2018, the day that he sent that vehicle, that Ford Excursion limousine to Amsterdam. He sent that vehicle. He knew of the risk. He consciously chose to disregard that risk on that day (A 355-57).

This is just one example, of many, where the jury could construe appellant's acts or omissions, that had nothing to do with the actual, triggering cause of the crash – catastrophic brake failure – as reckless based on Supreme Court's general charge. The jury could not have known of its duty to solely consider the foreseeability of catastrophic brake failure. The general charge undermines the confidence in the verdict and injects doubt into the unanimity of the jury's verdict. Supreme Court's general charge therefore deprived appellant of a fair trial.

B. Supreme Court's Refusal to Charge the Jury on Intervening Cause Requires Reversal

Many years ago, the Court of Appeals observed "that there is 'no statutory provision regarding the effect of an intervening cause of injury as it relates to the criminal responsibility of one who sets in motion the machinery which ultimately results in the victim's death; and there is surprisingly little case law dealing with the subject'" (*see Stewart*, 40 NY2d at 696 *quoting Kibbe*, 35 NY2d at 412). This is so because the "concept of causation, although frequently considered and discussed in civil cases, is rarely encountered in criminal law" (*see Stewart*, 40 NY2d at 696). If a "death is solely attributable to the secondary agency, and not at all induced by the primary one . . . its intervention constitutes a defense" (*see People v Kane*, 213 NY 260, 270 [1915]).

"When determining whether to give a charge on a claimed defense, the trial court must view the evidence in the light most favorable to the defendant" (*see People v Butts*, 72 NY2d 746, 750 [1988]). "Upon defendant's request, the court must instruct the jury on the defense if it is sufficiently supported by the evidence; failure to do so may constitute reversible error" (*see Butts*, 72 NY2d at 750). Moreover, a "jury may accept portions of the defense and prosecution evidence or either of them" (*see People v Asan*, 22 NY2d 526, 530 [1968]).

"A defendant's acts need not be the sole cause of death; where the necessary causative link is established, other causes, such as a victim's preexisting condition, will not relieve the defendant of responsibility for homicide" (*see Matter of Anthony M.*, 63 NY2d 270, 280 [1984]). "Even an intervening, independent agency will not exonerate defendant unless the death is solely attributable to the secondary agency, and not at all induced by the primary one" (*see People v Li*, 34 NY3d 357, 370 [2019]). But where such a defense is claimed, the People must prove, beyond a reasonable doubt, that the alleged intervening cause was not "sufficient to relieve a defendant of criminal liability for the directly foreseeable consequences of their actions" (*see People v Kern*, 75 NY2d 638, 658 [1990]).

In this case, appellant requested that the jury be charged regarding his argument that there was an intervening act between his conduct and the death of the decedents. Specifically, appellant contended that Mavis's failure was the intervening event leading to the deaths of the decedents. Supreme Court, however, refused to charge the jury on an intervening cause defense.

In so doing, Supreme Court ignored two fundamental principles. First, the evidence must be viewed in the light most favorable to the defense in connection with a charge request. And, second, the "determination of legal causation typically involves questions of foreseeability subject to varying inferences, creating issues that 'generally are for the fact finder to resolve'" (*see Finnigan v Lasher*, 90 AD3d 1286 [3d Dept 2011] *citing Derdiarian v Felix Contr Corp*, 51 NY2d 308, 345 [1980]).

Catastrophic brake failure was the uncontroverted cause of the crash. As discussed above, the jury should have been charged with specificity on that issue in terms of foreseeability. In any event, viewing the evidence in the light most favorable to the defense, there was a reasonable view of the evidence that Mavis's fraudulent mechanical work constituted an intervening act, extraordinary under the circumstances and not foreseeable in the normal course of events.

Mavis told appellant that the brakes were fine, told appellant they had replaced what needed to be replaced, they led appellant to believe that they conducted a New York State inspection on the vehicle and they led appellant to believe the vehicle passed that inspection. This intervening event exemplifies the "extraordinary under the circumstances" language and was "not foreseeable in the normal course of events." It is for the jury to decide, in the first instance, whether the proposed intervening act breaks the causal connection. Instead, Supreme Court refused to charge the jury with an intervening cause defense, prohibiting the jury from making that determination, thereby depriving appellant of a fair trial.

In the many years that have passed since *Kibbe* and *Stewart*, the case law on the issue of an intervening cause in the context of a criminal case remains underdeveloped. Courts have repeatedly reaffirmed the rule that it is not a defense to a homicide charge if death is "solely attributable to the secondary agency, and not at all induced by" the defendant's acts (*see Stewart*, 40 NY2d at 697). But what has developed is, as discussed in a dissenting opinion in *Kibbe*, an expectation that the trier of fact will resolve the issue – not the courts as a matter of law.

For example, in *People v Duffy*, the Court of Appeals addressed a scenario in which the defendant provided a rifle to the victim along with

ammunition, knowing that the victim had been drinking heavily and was in an extremely depressed and suicidal state (*see People v Duffy*, 79 NY2d 611, 616 [1992]). There, the Court rejected the defendant's claim that the victim's "act of loading the rifle and using it to kill himself constituted an intervening cause which – *as a matter of law* – relieved defendant of criminal responsibility" (*see Duffy*, 79 NY2d at 616 [emphasis added]).

Duffy followed *Kibbe*, which first addressed the absence of an intervening cause instruction. In the dissent at the Appellate Division, Justice Cardamone noted that "the jury, upon proper instruction, could have concluded that the victim's death by an automobile was a remote and intervening cause" (*see Kibbe*, 41 AD2d at 231 [dissenting, Cardamone, J.]). The dissent then held that "[t]he issue of causation should have been submitted to the jury in order for it to decide whether it would be unjust to hold these appellants liable as murderers for the chain of events which actually occurred" (*see* id.).[1] Upon review, the Court of Appeals, in *dicta*, agreed with the dissent that "the charge might have been more detailed," but did not reach the issue due to preservation (*see Kibbe*, 35 NY2d at 414).

[1] Even the majority agreed that "the trial court's charge respecting the cause of death was lacking in detail" (*see Kibbe*, 41 AD2d at 230).

Whether an intervening cause exists, therefore, is not something a trial court should reject as a matter of law, except under the most apparent circumstances. Instead, the courts must entrust the issue to a jury to resolve. In making that determination, the courts must view the evidence in the light most favorable to the defendant.

Despite appellant's request, Supreme Court refused to charge the jury regarding an intervening act. The issue is not whether, on this record, the People disproved the existence of an intervening act. Rather, the issue is whether Supreme Court, viewing the evidence in the light most favorable to the defense, should have charged the jury on intervening cause. Under *Stewart* and *Duffy*, appellant was entitled to that charge. The failure to charge the jury accordingly, shifted the determination of a factual issue to the prerogative of the trial court, thereby depriving appellant of a fair trial.

POINT II

THE PEOPLE FAILED TO PROVE APPELLANT'S GUILT OF BEYOND A REASONABLE DOUBT

Appellant was charged and convicted of second-degree manslaughter, even though the proof did not establish that catastrophic brake failure was foreseeable to appellant in light of the steps he took to have the vehicle serviced at Mavis nor did the proof establish an awareness and conscious disregard of a substantial and unjustifiable risk. Even when viewed in the light most favorable to the People, it is clear that appellant's conduct did not rise to the level of criminal recklessness. Therefore, this Court should reverse.

Evidence is legally sufficient, and therefore meets due process mandates, only if a rational trier of fact, viewing the evidence in the light most favorable to the People, could have found the crime's essential elements beyond a reasonable doubt (*see Jackson v Virginia*, 443 US 307, 319 [1979]; *People v Contes*, 60 NY2d 620, 621 [1983]; *People v Manini*, 79 NY2d 561, 568-69 [1992]).

Preliminarily, appellant's challenge to the legal sufficiency of the lack of evidence was preserved for this Court's review (*see* CPL § 470.05[2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]). If this Court were to find that the legal sufficiency challenge was unpreserved, then this Court should review

the legal sufficiency of the evidence in the interests of justice (*see People v Butler*, 273 AD2d 613, 614 [3d Dept 2000]; CPL § 470.15[6][a]).

A. The People did not Meet Their Burden of Proving Appellant's Guilt Beyond a Reasonable Doubt

Verdicts are legally sufficient "when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*see People v Danielson*, 9 NY3d 342, 349 [2007][internal citations omitted]). A sufficiency inquiry requires a court "to marshal the competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained their burden of proof" (*see Danielson*, 9 NY3d at 349).

As relevant here, "[a] person is guilty of manslaughter in the second degree when . . . [h]e recklessly causes the death of another person" (*see* Penal Law § 125.15[1]). A person acts "[r]ecklessly" when he "is aware of and consciously disregards a substantial and unjustifiable risk" that death will occur, and "[t]he risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (*see* Penal Law § 15.05[3]). As a result, the People must prove "the creation of a substantial and unjustifiable

risk; an awareness and disregard of the risk on the part of [the] defendant; and a resulting death" (*see People v Licitra*, 47 NY2d 554, 558 [1979]).

Causation is "an essential element" of second-degree manslaughter (*see Stewart*, 40 NY2d at 697). Causation may be found when the defendant's conduct "set in motion the events that led to the victims' deaths" and that the "defendant's conduct was a sufficiently direct cause of the ensuing deaths" (*see People v Ballenger*, 106 AD3d 1375, 1377 [3d Dept 2013][internal quotation marks and citations omitted]). A defendant's conduct will qualify "as a sufficiently direct cause when the ultimate harm should have been reasonably foreseen" (*see Ballenger*, 106 AD3d at 1377][internal quotation marks and citations omitted]).

<u>Reasonably Foreseeable</u>

As for causation, the People had to prove that appellant was a "sufficiently direct cause" of the other's death (*see Stewart*, 40 NY2d at 697). To satisfy that standard, the People had to prove both: (1) that appellant's conduct constituted an "actual contributory cause" of death and (2) that death was a "reasonably foreseeable" result of the actor's conduct (*see Davis*, 28 NY3d at 300).

Based on the evidence adduced at trial, or more aptly put, the lack thereof, it is implausible to accept that the catastrophic brake failure was

reasonably foreseeable, except impermissibly by hindsight (*see People v Reagan*, 256 AD2d 487, 489-90 [2d Dept 1999][While tragic drownings ensued, that does not convert the defendants' actions into criminal recklessness, except by hindsight. Thus, this case also fails to satisfy the foreseeability element of criminal liability for recklessness"]).

The circumstances of lack of foreseeability here are similar to those found in *Roth*. There, the Court of Appeals dismissed charges of manslaughter and criminally negligent homicide stemming from a death of an employee who was killed when petroleum vapors exploded while cleaning a tank trailer because the evidence of foreseeability was insufficient (*see Roth*, 80 NY2d at 239). In *Roth*, the prosecution theorized "that the defendants were responsible for a variety of unsafe conditions and improper practices at the facility and that the explosion and death were the foreseeable results of these conditions and practices" (*see Roth*, 80 NY2d at 243).

Though the Court of Appeals agreed that legally sufficient evidence supported "the conclusion that the explosion was in fact caused by conditions for which the defendants were responsible" in that the "defendants allowed a tank containing petroleum products to be cleaned without adequate ventilation and in the presence of numerous sources of ignition," the Court nonetheless found the evidence to be legally insufficient to establish that the explosion

was foreseeable, thereby rendering the defendants not liable for homicide (*see Roth*, 80 NY2d at 243, 245). In reaching that conclusion, the Court held that the People needed to show that the defendant should have foreseen the fatal accident would occur in the manner that it did (*see Roth*, 80 NY2d at 243-44 ["For purposes of criminal liability, it was not enough to show that, given the variety of dangerous conditions existing at the site, an explosion was foreseeable; instead the People were required to show that it was foreseeable that the explosion would occur in the manner that it did"]).

Unsurprisingly, few cases addressing a homicide in the context of deficient brakes exist. The Second Department reviewed one such charge where the defendant's vehicle, before a fatal accident, experienced "a partial loss of brake fluid, in that brake fluid was enabled to seep through" defective parts of the braking system (*see People v Bonaventura*, 271 AD 900, 900 [2d Dept 1946]). While no proof existed as to how long this condition was present before the accident, it "resulted in the necessity of pumping or depressing the foot pedal more than once in order to have it function" (*see Bonaventura*, 271 AD at 900). Despite the inadequacy of the brakes, the court held the evidence of criminal negligence was insufficient because of the lack of foreseeability:

> [T]here is no proof that, by reason thereof, a steady and progressive deterioration of brake pressure occurred. It was the tear through which brake fluid could seep which rendered the brake useless. There is no proof that this tear, as distinguished

> from the wear preceding it, did not suddenly occur. One of the expert witnesses for the prosecution testified on that phase, 'I don't know, I wouldn't answer that.' The proof is insufficient to warrant the conviction. It fails to show notice to defendant which would serve to make plain to her the grave nature of the latent defect and the dire jeopardy in which she placed the lives of her family, as passengers, and herself, as well as those of other persons, by operation of the automobile (*see Bonaventura*, 271 AD at 900).

In this case, foreseeability was even more obscure than in *Bonaventura*, as appellant was alleged only to have operated the company which owned the limousine, and not to have driven the vehicle himself in connection with the fatal accident. As such, there can be no similar claim here, as in *Bonaventura*, that he was potentially aware of "necessity of pumping or depressing the foot pedal more than once in order to have it function" (*see Bonaventura*, 271 AD at 900).

A further comparison of other cases involving vehicular accidents reveals why the evidence here was legally insufficient with respect to foreseeability. For example, this case did not involve a defendant's failure to "take[] any steps to evaluate his vehicle's safety" (*see People v Congregation Khal Chaisidei Skwere*, 232 AD2d 919 [3d Dept 1996]), or one in which the defendant personally serviced the vehicle as its mechanic (*compare Com v Keysock*, 345 A2d 767 [Pa Sup Ct 1975]). To the contrary, appellant, who was not a mechanic, repeatedly brought the vehicle to Mavis, a licensed

mechanic, and paid to have its brakes serviced, which included doing "whatever it needed" to get the limousine operating "so it's got brakes" (A 177, 186). And, in turn, Mavis assured appellant that its mechanics were "the only ones who could fix this thing" and that after doing so, the vehicle passed a New York State safety inspection and "[his] brakes are working" (A 194, 199-200, 201).

The evidence here was insufficient, as a matter of law, to establish that catastrophic brake failure, which resulted in the fatal limousine crash, was reasonably foreseeable. In the criminal context, the "actual immediate, triggering cause" of a fatality must be foreseeable for a defendant to be found guilty of second-degree manslaughter (*see Warner-Lambert*, 51 NY2d at 307). In sharp contrast, a general foreseeable risk and an action that ignites a chain of causation, resulting in death, cannot by themselves prove that a defendant caused a specific reckless homicide (*see Warner-Lambert*, 51 NY2d at 305-06).

The People had to prove that catastrophic brake failure was reasonably foreseeable to appellant. Chase testified that the chain of events leading to catastrophic brake failure began when the steel brake line failed due to rust that resulted in a fracture (A 303). According to Chase, the steel brake line appeared to be the original and should have been replaced at least two years

before the crash (A 311, 343). The evidence at trial did not demonstrate that appellant knew that the steel brake line needed to be replaced.

To the contrary, the March 21, 2018, violations he received referenced defective brakes, the hydraulic brake line and the brake connections, but not the steel brake line (A 120, 126, 129-31). Two months before this inspection, appellant had taken the limousine to Mavis for service of the brake system (A 171-72). Following the issuance of the violations, appellant took the limousine to Mavis for brake service (A 173). Mavis recommended a hydraulic fluid flush and replacement of the four calipers and brake hoses (A 176). Mavis did not recommend replacing the steel brake line.

In May 2018, appellant asked Mavis to perform a NYS inspection on the limousine (A 178). The limousine passed inspection and the need to replace the steel brake line was not referenced (A 201-03). As it turned out, Mavis never performed the inspection – a result that appellant reasonably relied on; one does not expect catastrophic brake failure to occur five months after passing NYS inspection (A 208).

In July 2018, appellant took the limousine back to Mavis for service and the steel line was only potentially mentioned in the context of blowing out the steel line with compressed air to remove all of the fluid out (A 184). No mention of a need to replace the steel line due to rust was ever made.

A month before the crash, the limousine underwent another inspection where Smith noted that progress had been made (A 154). While violations were issued to appellant, none of the violations dealt with the brake system (A 148-54). More particularly, no violation mentioned the need to replace a steel brake line.

The People broadly sought to impose strict liability for homicide based on several violations of NYSDOT regulations, irrespective of foreseeability. Essentially, the People claimed that appellant did not have DOT authority to operate the limousine, which would have required a NYSDOT inspection, which necessarily would have uncovered the problems with the brake system that led to the crash on October 6, 2018. The problem with the People's claim is that the failure to obtain a NYSDOT inspection did not make catastrophic brake failure foreseeable to appellant and no court has held otherwise.

This Court's decision in *Congregational Khal Chaisidei Skwere* is instructive. There, a corporation was held liable when the corporate vehicle hydroplaned, causing the death of two passengers, where the corporation placed the vehicle in operation without a valid State inspection, without taking any steps to evaluate the vehicle's safety and where the vehicle's operation was entrusted to a youthful driver of unknown driving ability (*see Congregational Khal*, 232 AD2d at 920-21). Even then, the corporation was

convicted only of criminally negligent homicide (*see Congregational Khal*, 232 AD2d at 920).

In contrast, appellant repeatedly had the limousine serviced by Mavis and within five months of the crash, had sought a NYS inspection and believed that the limousine had passed that inspection. That a steel brake line would fracture, with no specific warning, within five months of passing a NYS inspection is simply not foreseeable. A finding of criminal liability despite the steps appellant took here effectively holds appellant as the guarantor of a certified mechanic's work, a result that no court has found before. Given appellant's interactions with Mavis, the evidence presented was insufficient to establish that it was reasonably foreseeable to him that the limousine would experience a fatal accident caused by catastrophic brake failure – the actual immediate triggering cause.

<u>Aware of and Conscious Disregard</u>

Even if it could be said that the deaths turned on reckless conduct, which they were not, the People still failed to prove beyond a reasonable doubt that appellant acted with the mens rea required for second-degree manslaughter – that is, that he was specifically aware of, and disregarded, the substantial risk that the limousine would suffer from catastrophic brake failure on October 6, 2018, resulting in death (*see Licitra*, 47 NY2d at 558). Indeed,

appellant's alleged disregard of a risk constituted, at most, a failure to "perceive" (*see* Penal Law § 15.05[4]).

"Recklessness is the mens rea necessary for manslaughter in the second degree" (*see People v Gaworecki*, 37 NY3d 225, 228 [2021]). "A defendant acts recklessly in this context if the defendant 'is aware of and consciously disregards a substantial and unjustifiable risk' that death will result" (*see Gaworecki*, 37 NY3d at 230 *quoting* Penal Law § 15.05[3]). "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (*see* Penal Law § 15.05[3]).

Here, no evidence established that appellant was aware of a risk of catastrophic brake failure. Without foreseeing that such a circumstance would occur in the manner that it did, appellant could not consciously disregard it, so as to give rise to the critical element of recklessness. It follows that a person cannot disregard a risk of a reasonably foreseeable harm if the facts giving rise to that risk are not known.

In short, this was a tragic accident and not a reckless killing. The reckless manslaughter convictions were therefore based on legally insufficient evidence. Accordingly, the convictions should be reversed and the indictment

dismissed. Alternatively, the convictions should be reversed and reduced to criminally negligent homicide.

B. The Verdict was Against the Weight of the Evidence

Even if the evidence is sufficient, this Court must "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" where a reasonable view of the evidence supports an outcome contrary to that reached by the trier of fact (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). The verdict must be set aside if it appears the fact-finder failed to accord the evidence the proper weight (*see Bleakley*, 69 NY2d at 495). Under a weight of the evidence review, this Court "sits as a thirteenth juror and decides which facts were proven at trial" (*see Danielson*, 9 NY3d at 348-49 [2007]).

In conducting a weight of the evidence review, courts must consider the elements of the crime, "for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt" (*see Danielson*, 9 NY3d at 349). In doing so, a court must not limit its review to credibility issues; rather, a court must "weigh the conflicting testimony and conflicting inferences in light of the elements as charged at trial" (*see Danielson*, 9 NY3d at 350). Ultimately, based on the weight of the credible evidence, this Court must decide whether the jury was justified in

finding appellant guilty beyond a reasonable doubt (*see People v Crum*, 272 NY 348 [1936]).

This Court must necessarily consider whether the People satisfied their burden of proof for each element of second-degree manslaughter as part of the weight of the evidence review (*see People v Harris*, 162 AD3d 1240, 1241-42 [3d Dept 2018]). To that end, we reassert the arguments made as part of the legal sufficiency analysis and submit they are even more prevailing under weight of the evidence review. Specifically, the proof that catastrophic brake failure was reasonably foreseeable to appellant or that appellant was aware of the risk of catastrophic brake failure and that he consciously disregarded that risk is against the weight of the evidence.

POINT III

SUPREME COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT AN ADJOURNMENT TO ALLOW APPELLANT LONGER THAN 20 MINUTES TO ACCEPT AN ENHANCED SENTENCE AND RESULTED IN AN UNINTELLIGENT, UNKNOWING AND INVOLUNTARY MOTION TO WITHDRAW

The August 31, 2022 proceeding was theatrical. Merely a week prior, Supreme Court noted the lack of good cause to extend the period of interim probation and scheduled sentencing. The parties received no notice that Supreme Court was even considering reneging on the agreed upon plea bargain. Even though Supreme Court intended to enhance appellant's sentence, if he did not withdraw his plea, victim impact statements were presented.

Finding the plea proceeding "fundamentally flawed" and "not based on truth" predicated on Supreme Court's own interpretation of the evidence, essentially acting as the trier of fact, Supreme Court decried the plea agreement as "disingenuous and unacceptable" leading to the announcement that "I am not going to abide by the plea agreement," which was met with applause (A 56-58). Supreme Court then gave appellant a difficult choice – accept an enhanced sentence of one and one-third to four years in prison or withdraw the plea agreement that had existed for a year (A 58-59). The

difficult choice turned into an impossible one when Supreme Court noted appellant must make that decision in less than 20 minutes (8-31-23 at 28-30).

Following the short break in the proceedings, Supreme Court instructed an officer to interrupt appellant's meeting with his attorneys and turned to appellant's counsel (A 61-62). Appellant's counsel requested more time to make a decision; Supreme Court cut off this request, and demanded a decision (A 62). At that point, appellant sought to withdraw his plea (A 62). The refusal to afford appellant more time to make a crucial and significant decision was error.

A. Supreme Court's Failure to Adjourn Compels Reversal

The decision to grant an adjournment is a matter of discretion for the trial court and "will not be disturbed absent an abuse of that discretion" (*see People v Booker*, 141 AD3d 834, 835 [3d Dept 2016][internal quotations omitted]; *People v Singleton*, 41 NY2d 402, 405 [1977]). "But in particular situations, when the protection of fundamental rights has been involved in requests for adjournments, that discretionary power has been more narrowly construed" (*see People v Spears*, 64 NY2d 698, 700 [1984]).

Two fundamental rights intersect here. First, "[t]he right to counsel . . . is inherent in the concept of a fair trial" (*see People v Cooper*, 307 NY 253, 259 [1954]). That right is protected "under both the Federal and State

Constitutions" (*see People v Koch*, 299 NY 378, 381 [1949]). The fundamental right to counsel "is denied to a defendant unless [the defendant] gets reasonable time and a fair opportunity . . . to prepare for trial" with "counsel's assistance" (*see People v McLaughlin*, 291 NY 480, 482-83 [1944]). The right "includes the right to consult counsel in private, without fear or danger that the People . . . will have access to what has been said" (*see People v Gamble*, 18 NY3d 386, 396 [2012]). The right to counsel, which is "based . . . on a fundamental principle of justice, must be protected by the trial judge" (*see McLaughlin*, 291 NY at 482), "not . . . as a mere matter of rote, but with sound and advised discretion, . . . and with a caution increasing in degree as the offenses dealt with increase in gravity" (*see Glasser v United States*, 315 US 60, 71 [1942][internal quotations omitted]).

Second, "a decision to plead guilty is one of the most solemn and personal rights that a person has" and, regardless of the defendant's underlying motivations, the decision is his "alone to make" (*see People v Rolston*, 66 AD2d 617, 628 [2d Dept 1979]). Due process requires that the waiver of the fundamental right to trial be made knowing, voluntary and intelligent (*see People v Hill*, 9 NY3d 189, 191 [2007]). As such, "[p]rior to accepting a guilty plea . . . a defendant must be informed of the direct consequences of the plea" (*see Hill*, 9 NY3d at 191). To that end, ensuring

that a defendant has "sufficient time to consult with counsel" is critical (*see People v Torres*, 165 AD3d 1325, 1326 [3d Dept 2018]; *People v White*, 104 AD3d 1056, 1057 [3d Dept 2013]).

"The competency of counsel and the degree of actual participation by counsel, as well as his opportunity for and the fact of consultation with the pleading defendant, are particularly important" (*see People v Nixon*, 21 NY2d 338, 354 [1967]). "Indeed, if independent and good advice in the interest of the defendant is the goal, it is more important that he consult with competent counsel . . ." (*see Nixon*, 21 NY2d at 354).

Here, appellant arrived for sentencing on August 31, 2022 expecting specific performance of the plea agreement he entered into over a year ago, one that would allow him to walk out of the courtroom to continue the rehabilitation process through a probationary sentence. Unbeknownst to him, Supreme Court intended to drastically enhance his sentence to the maximum permissible for criminally negligent homicide. As described by Justice Aarons, the evisceration of the plea agreement was "surprising" in that it happened "in a fleeting moment" and "[i]t was undone at the last possible instant" (*see Matter of Hussain v Lynch*, 215 AD3d 121, 134 [3d Dept 2023][Aarons, J. dissenting]).

The attorneys, let alone appellant, were taken aback by Supreme Court's decision (A 63 ["So, Judge, it's [been] many years since we've had an opportunity to review the file. You know, we were prepared today for sentencing, not to try the case"]). Despite the surprise, Supreme Court afforded appellant a mere 20 minutes to consult with counsel and decide whether to accept the enhanced sentence or to withdraw his plea and proceed to trial. The time allotted for that purpose can hardly be described as "sufficient" or "adequate" (*see Torres*, 165 AD3d at 1326; *White*, 104 AD3d at 1057).

Knowing that 20 minutes was woefully inadequate for a client to make such a decision, counsel told Supreme Court that appellant needed more time to make a decision (A 62). The request for additional time was eminently reasonable and warranted under these peculiar circumstances. Supreme Court refused to grant the adjournment, without any legitimate explanation, and simply demanded an answer (A 62). As such, counsel felt "impelled" to withdraw appellant's plea (A 62).

Supreme Court immediately sought to schedule a trial date and when co-counsel noted a conflict with that date in another jurisdiction, Supreme Court suggested the trial could proceed in his absence (A 62-63). Ultimately, Supreme Court set up a control date two weeks out to address any potential

hearings that may be outstanding as well as scheduling a trial date (A 64). In other words, Supreme Court would adjourn proceedings for two weeks for what can be described only as housekeeping measures, but was unwilling to afford any extra time to appellant in making one of the biggest decisions of his life.

A defendant has a "fundamental right to effectively confer with counsel" (*see People v Norris*, 190 AD2d 871, 872 [2d Dept 1993]). In *Norris*, an attorney mistakenly believed a court appearance was on for a conference, not a hearing and requested an adjournment until the attorney whose case it was returned (*see Norris*, 190 AD2d at 872). The court denied the request and proceeded to conduct the hearing, even though the attorney made clear they were not ready to proceed (*see Norris*, 190 AD2d at 872). The Second Department reversed, holding that "the court's refusal to grant an adjournment . . . implicated the defendant's fundamental right to effectively confer with counsel" and noted "the inconvenience that would have resulted from a short adjournment did not outweigh the prejudice suffered by the defendant" (*see Norris*, 190 AD2d at 872).

Similarly, in *Spears*, the defense attorney requested time to discuss with the defendant whether he wanted to testify at trial, but the court denied the request (*see Spears*, 64 NY2d at 699). As a result, the defense rested (*see*

Spears, 64 NY2d at 699). The Court of Appeals held that the trial court's refusal "implicat[ed] defendant's fundamental right effectively to confer with his counsel" and concluded the court's conduct "was arbitrary and an abuse of discretion as a matter of law" (*see Spears*, 64 NY2d at 700).

Like *Norris* and *Spears*, Supreme Court's refusal to provide more time for appellant to consult with counsel as to whether he should proceed with an enhanced sentence or withdraw his plea implicated appellant's fundamental right to effectively confer with counsel. The unique context of this case is necessary. All parties were prepared for sentencing to go forward under the terms of the plea agreement. For a year, appellant believed, provided he complied with interim probation, he would be sentenced to 5 years of probation and not serve any jail time. And suddenly, at the last moment, he is informed if he wanted to proceed with sentencing, he must accept an enhanced sentence of one and one-third to four years in state prison.

In essence, Supreme Court provided appellant a new plea bargain. "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel" (*see Padilla v Kentucky*, 559 US 356, 364 [2010][internal quotations omitted]). Appellant was entitled to effective assistance of counsel before making that decision and Supreme

Court limited how long appellant could consult with counsel to 20 minutes, refusing the reasonable request for more time.

While "in the vast majority of plea bargains the overwhelming consideration for the defendant is whether he will be imprisoned and for how long" (*see People v Gravino*, 14 NY3d 546, 559 [2010]), this Court should not discount the immediate consequences to appellant had he proceeded with sentencing. He had no notice in which to prepare for immediate imprisonment. This was not a situation where he was already prepared to enter a custodial setting. He could not, for instance, make arrangements for his property, communicate with his employer, meet with friends and family or mentally prepare to enter a prison.

The idea that counsel could effectively confer with appellant on the risks and rewards of accepting Supreme Court's enhanced offer or rejecting and proceeding to trial is unfathomable. That is compounded by two other factors: (1) counsel had not looked at the file in over a year and could not possibly provide meaningful advice on the risks of trial and (2) though appellant was represented by able counsel, the lead attorney was not present and could not be reached in the small window provided by Supreme Court (A 63). To say that appellant had enough time to process what had just occurred,

to effectively confer with counsel and to make an intelligent decision ignores reality and casts aside all notions of fairness.

For example, the Court of Appeals, in *People v Schultz*, addressed a similar scenario where the trial court promised a specific sentence at the time of the plea, but then determined that promise could not be honored because a longer sentence was appropriate (*see People v Schultz*, 73 NY2d 757, 758 [1988]). There, the defendants had a chance to withdraw their pleas and "were granted more than a week's adjournment so that they could consider their options" (*see Schultz*, 73 NY2d at 758). The Court held that the trial court did not abuse its discretion, in part, because the "defendants were afforded ample opportunity to withdraw their pleas" (*see Schultz*, 73 NY2d at 758).

In contradistinction, appellant was given only 20 minutes to confer with counsel. Supreme Court even directed a court officer to interrupt appellant's consultation with his attorneys to order them to reappear and provide a decision. We do not mean to suggest any particular amount of time is required, but the amount must be reasonable (*see People v Bostic*, 34 AD2d 597, 597 [3d Dept 1970][holding that a defendant was not denied the right to counsel where he was given "additional time to consult with counsel" before the hearing and where the plea of guilty occurred the day following the hearing "after 'thorough' discussion with counsel"]). A determination of what

is reasonable necessarily depends on the circumstances of the individual case. And the defense attorney is uniquely positioned to provide insight into the reasonableness of the time afforded.

20 minutes to accept or reject an enhanced sentence is patently unreasonable absent a contrary representation by counsel. The degree of unreasonableness is magnified here in the absence of any prejudice to the court or the People if more time had been given. The case had been dormant, pending sentencing for a year. The case adjourned for two weeks to schedule a trial date. A date for trial was put 8 months out from the date of the adjournment request. Supreme Court had no reason not to give appellant more time to consider the enhanced sentence.

The abuse of discretion is magnified here where after appellant withdrew his plea, he tried to again enter a plea to criminally negligent homicide and accept the enhanced sentence Supreme Court mandated (A 30). The People would extend that offer (A 30). Supreme Court, however, without any explanation would not (A 30).

The need to have adequate time to discuss a plea bargain, particularly one involving jail time, is not novel. Based on conversations with counsel, appellant eventually sought to accept Supreme Court's enhanced sentence. Nothing justifies Supreme Court's rejection of appellant's request for the

enhanced sentence. Supreme Court had already determined that the sentence was fair and just under the circumstances. The People were willing to extend the offer. Only four court appearances took place between the date of the withdrawn plea and appellant's request to plea; one appearance involved scheduling the trial and the other two appearances involved appellant's release status. The only other development between the date of the withdrawn plea and appellant's request to plea was an unsuccessful article 78 proceeding to try to compel Supreme Court to abide by the original plea agreement (*see Matter of Hussain*, 215 AD3d at 121). That hardly warranted the result here.

Under these circumstances, Supreme Court's denial of appellant's reasonable request for an adjournment was an abuse of discretion, requiring that his conviction be reversed, his September 2, 2019 plea reinstated and the matter remitted for sentencing in accordance with the plea agreement; if Supreme Court continues to insist on an enhanced sentence, appellant can then make an informed decision, one aided by adequate time to consult with counsel (*see People v Foy*, 32 NY2d 473, 476-77 [1973]).

B. The Withdrawal of the Guilty Plea was not Knowing, Intelligent and Voluntary

Courts uphold guilty pleas if they are "entered voluntarily, knowingly and intelligently" (*see People v Haffiz*, 19 NY3d 883, 884 [2012]). Necessarily, a knowing, voluntary and intelligent plea must involve "an

affirmative showing on the record" that the defendant waived his constitutional rights (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). A record, however, that is "silent will not overcome the presumption against waiver by a defendant of constitutionally guaranteed protections" (*see People v Harris*, 61 NY2d 9, 17 [1983]).

"Presuming waiver from a silent record is impermissible" (*see Harris*, 61 NY2d at 365). Instead, the "record must show, or there must be an allegation and evidence which show, that an accused intelligently and understandingly rejected his constitutional rights" (*see Harris*, 61 NY2d at 365-66).

In an issue of seeming first impression, we submit that appellant's withdrawal of his guilty plea was not made knowingly, intelligently and voluntarily. The record does not demonstrate, in any way, that appellant understood his options, appreciate the consequences of withdrawing his plea or that he had enough time to consult with counsel on this issue. To the contrary, there is a complete absence of any discussion with appellant and the record demonstrates the finite amount of time afforded to appellant to make the decision.

Counsel requested more time to consult with appellant, but Supreme Court denied that reasonable request. As Justice Aarons concluded "[w]ithout

being provided additional time . . . the withdrawal of the plea was not an intelligent choice, let alone, a choice" (*see Matter of Hussain*, 215 AD3d at 137 n2 [Aarons, J. dissenting]). When pressed, counsel ultimately stated he was "impelled" to withdraw appellant's prior guilty plea (A 62).

Without an inquiry with appellant of his desire to withdraw his plea and absent sufficient time for him to make that determination, it cannot be said that counsel's withdrawal of the guilty plea was supported by a knowing, intelligent and voluntary decision by appellant. As a result, appellant's conviction must be reversed, his September 2, 2019 plea reinstated and the matter remitted for sentencing in accordance with the plea agreement; if Supreme Court continues to insist on an enhanced sentence, appellant can then make an informed decision, one aided by adequate time to consult with counsel and confirmed by inquiry from the court.

POINT IV

APPELLANT'S SENTENCE SHOULD BE REDUCED IN THE INTEREST OF JUSTICE AS THE SENTENCE IMPOSED WAS UNDULY HARSH AND EXCESSIVE

This Court is uniquely vested with the power to address the length of a defendant's sentence in the interests of justice (*see People v Rahaman*, 189 AD3d 1709, 1714 [3d Dept 2020]). Accepting the jury's verdict, as we must for purposes of this point, appellant stands convicted of recklessly causing the deaths of 20 people. We recognize the tragic loss of life that has and will continue to reverberate in our communities.

But the sentenced fashioned by Supreme Court – the maximum allowable – penalized appellant for exercising his right to a trial, ignored the steps appellant took while on interim probation, which effectively sentenced him to more than what was statutorily permissible. We submit that the maximum sentence imposed here, was excessive under the circumstances and should be reduced in the interest of justice.

For sentencing purposes, courts consider the crimes charged, the particular circumstances of the offender, and the purposes of a penal sanction (*see People v Farrar*, 52 NY2d 302, 305-06 [1981]). Based on law and strong public policy, courts are entrusted with sentencing determinations because the court is "detached from outside pressures often brought to bear on the

prosecution and defense" (*see Farrar*, 52 NY2d at 306). To that end, "the court must perform the delicate balancing necessary to accommodate the public and private interests represented in the criminal process" (*see Farrar*, 52 NY2d at 306).

The considerations of sentencing include deterrence, rehabilitation, retribution and isolation (*see People v Hooks*, 96 AD2d 1001, 1002 [3d Dept 1983]; *People v Suitte*, 90 AD2d 80, 83-84 [2d Dept 1982]). Deterrence has two aims: (1) to deter the "specific offender from repeating the same or other criminal acts" and (2) to promote general deterrence by discouraging the public from recourse to crime (*see Suitte*, 90 AD2d at 84). Retribution "includes the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves, community condemnation and the community's emotional desire to punish the offender" (*see Suitte*, 90 AD2d at 84). Finally, isolation "segregate[s] the offender from society so as to prevent criminal conduct during the period of incarceration" (*see Suitte*, 90 AD2d at 84).

Turning to the factors courts use to guide its sentencing determination, we address each in turn.

<u>Crimes Charged</u>

Following a jury trial, appellant was convicted of twenty counts of second-degree manslaughter. As discussed above, the conviction stems from an incident where appellant, as found by the jury, recklessly caused the death of twenty people when the limousine belonging to his business tragically crashed at the bottom of a hill.

Second-degree manslaughter, given the significance of the loss of a life, constitutes a serious crime and is treated as such by the Legislature. The maximum sentence – 5 to 15 years – imposed by Supreme Court is authorized by the Legislature (*see* Penal Law §§ 60.01[3][a], 70.00). At the same time, a much less onerous prison sentence is also authorized – 1 to 3 years (*see* Penal Law §§ 60.01[3][a], 70.00). Even a probation sentence is authorized (*see* Penal Law §§ 60.01[2][a][i], 65.00).

Though we recognize that the crime appellant was convicted of is serious, taking the People's evidence as true, the deaths of these individuals were not planned or intended or desired. Appellant took many steps to remedy the brake system on the limousine—the cause of the crash. While serious, under these circumstances, the maximum sentence that is usually reserved for hardened criminals, is unwarranted.

<u>Trial Penalty</u>

While a defendant forfeits the benefit of a plea deal by electing to go to trial (*see People v Van Pelt*, 76 NY2d 156, 160 [1990]), "retaliation or vindictiveness may not play a role in sentencing a convicted defendant who ha[s] elected to proceed to trial rather than plead guilty pursuant to a negotiated bargain" (*see People v Shaw*, 124 AD2d 686 [2d Dept 1986]). "[W]hile the mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof positive that [a] defendant was punished for asserting his right to trial" where there is a "considerable disparity between the sentence offered prior to trial and that ultimately imposed after trial" the sentence is "too extreme a penalty for [a] defendant's exercise of his constitutional right to a jury trial" (*see People v Riback*, 57 AD3d 1209, 1218 [3d Dept 2008][internal quotations and citations omitted]; *People v Morton*, 288 AD2d 557, 559 [3d Dept 2001]).

Here, the People offered to resolve this matter with a plea to criminally negligent homicide along with an interim probation period, which contained many conditions, including community service. Appellant accepted and proceeded to perform community service and abide by the other conditions. Supreme Court, however, refused to abide by the plea agreement (A 58). Instead, Supreme Court stated the appropriate sentence was an indeterminate

sentence with a maximum of four years and at least one and a third years (A 58).

At sentencing, Supreme Court was empowered to impose a sentence as low as 1 to 3 years and as high as 5 to 15 years. Supreme Court had a bevy of sentencing options to impose. For example, 1.5-4.5, 2-6, 2.5-7.5, 3-9, 3.5-10.5, 4-12 and 4.5-13.5 are permissible sentences for a second-degree manslaughter conviction. Many of the permissible sentences resembled the intended sentence Supreme Court offered when appellant withdrew his plea. Supreme Court bypassed these potential sentences and instead imposed the maximum sentence. In so doing, Supreme Court effectively penalized appellant for exercising his right to a trial by a jury of his peers.

A substantial disparity between a plea offer and a sentence imposed after trial will justify reducing a sentence to avoid penalizing a defendant for exercising his right to a fair trial. For example, in *People v Riback*, this Court did acknowledge the People's ability to induce a guilty plea "by offering substantial benefits" and that the defendant "forfeited the benefit of the plea offer by electing to go to trial," this Court concluded that "County Court may have placed undue weight upon defendant's ill-advised decision to reject the very favorable plea bargain and proceed to trial" (*see Riback*, 57 AD3d at 1218).

In this case, the People made a probation offer to resolve the pending charges. After a reassignment of judges, Supreme Court announced at sentencing that the plea bargain was unacceptable and proposed a sentence of 1.3 to 4 years (A 58). Supreme Court's decision, to impose the maximum sentence, based on no additional factor other than appellant's decision to proceed to trial illustrates the "undue weight" placed on appellant's decision to reject the alternative sentencing resolution by Supreme Court (*see Riback*, 57 AD3d at 1218).

Particular Circumstances of the Offender

At the time of sentencing, appellant was 33 years old and his only prior conviction was for a minor offense, second-degree obstructing governmental administration (*see* PSI at 1-3). He had never been arrested or charged with a felony nor had he ever been arrested or charged with a crime of violence.

On September 2, 2021, appellant was placed on interim probation. During that year long period, appellant completed over 400 hours of community service (*see* PSI at 8-9). On August 31, 2022, interim probation was terminated by Supreme Court and appellant was ordered to install a GPS device and report weekly to the probation department (*see* PSI at 8). Appellant reported weekly to probation, installed the GPS device and committed no other crimes (*see* PSI at 9).

Because this case can be viewed only as an aberration, and he has shown his capacity to be a productive member of society, he is a particularly good candidate for rehabilitation. He dutifully complied with the interim probation conditions and the court ordered release conditions, demonstrating a rehabilitative attitude. The maximum sentence this first-time felony offender received is both unnecessary and unwarranted.

Probation Recommendation

Following the verdict, the probation department conducted an updated pre-sentence investigation. The pre-sentence investigation report revealed many positive factors about appellant both before and after the incident. Ultimately, the recommendation was for appellant to "be sentenced at the discretion of the court" (*see* PSI at 9).

Deterrence

As mentioned above, deterrence assumes punishment will prevent the offender from committing further crimes and also that punishment will prevent others from committing similar crimes. The aim of deterring others from committing similar crimes will be satisfied with a reduction from the maximum sentence.

Retribution

Retribution presumes that the punishment must fit the crime. The maximum sentence is unjust retribution and a lesser sentence is sufficient retribution.

Rehabilitation

Rehabilitation seeks to reform the individual and even the federal government recognizes that "imprisonment is not an appropriate means of promoting correction and rehabilitation" (*see* 18 USC § 3582[a]; *Tapia v United States*, 564 US 319 [2011]). While we recognize that a period of incarceration may be warranted under the circumstances, the maximum sentence leaves much less opportunity for rehabilitation and reentry into the community.

Isolation

The sentencing consideration of isolation, which is designed to segregate a defendant from a community, does not require the maximum sentence. Rather, a lesser sentence is an adequate period of isolation to segregate appellant from the community based on the crimes at issue.

Thus, appellant asks this Court to reduce his sentence in the interest of justice, in the event this Court declines to reverse (*see* Criminal Procedure Law § 470.15[6][b]).

CONCLUSION

FOR THE REASONS STATED ABOVE, APPELLANT'S JUDGMENT SHOULD BE REVERSED. ALTERNATIVELY, APPELLANT'S SENTENCE SHOULD BE REDUCED.

RESPECTFULLY SUBMITTED,

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Dated: March 29, 2024

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